

April 12, 2010

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**Elisabeth A. Shumaker  
Clerk of Court

In re:

CHARLES JEFFREY McMILLIAN,

No. 10-1098

Movant.

**ORDER**Before **TACHA**, **HARTZ**, and **HOLMES**, Circuit Judges.

Charles Jeffrey McMillian, a Colorado state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas corpus petition. We deny authorization.

In 1994, Mr. McMillian pleaded guilty to conspiracy to commit first-degree murder, retaliation against a witness, second-degree murder, and aggravated motor vehicle theft. Before sentencing, he moved to withdraw his guilty plea. The motion was denied and he was sentenced to sixty-four years of imprisonment.

Mr. McMillian filed a § 2254 habeas petition in 1998, asserting that his plea was not voluntary or intelligent because he was under the influence of the prescribed drug Halcion at the time he pled guilty and his counsel was ineffective for allowing him to plead guilty while he was under the influence of Halcion. At

Mr. McMillian's request, the district court granted a voluntary dismissal without prejudice so that he could exhaust state-court remedies.

Mr. McMillian filed another petition for § 2254 habeas corpus relief in 1999, asserting that his counsel was ineffective and he was denied due process because counsel failed to assert his mental impairment as an affirmative defense. The district court dismissed the action as time-barred. On appeal, we vacated the district court's order and remanded for the court to determine whether the petition was timely. *McMillian v. Hickox*, No. 00-1151, 2000 WL 1846200 (10th Cir. Dec. 18, 2000). On remand, the district court granted Mr. McMillian's motion to dismiss without prejudice so that he could exhaust state remedies on a new claim.

In May 2005, Mr. McMillian filed another habeas petition under § 2254, asserting that (1) his due process rights were violated because his guilty plea was not free and voluntary as he was under the influence of Halcion; (2) his counsels were ineffective (a) for failing to investigate the defense of involuntary intoxication due to his taking Halcion, (b) for allowing him to plead guilty while he was under the influence of Halcion, (c) for failing to present all mitigating evidence at his sentencing hearing, (d) for failing at his withdrawal of plea hearing to assert his innocence due to involuntary intoxication by Halcion, and (e) for failing to assert on direct appeal that his counsel at his withdrawal of plea hearing was ineffective, his plea was involuntary, and he was innocent due to involuntary intoxication; and (3) the accumulated errors in (1) and (2) violated his

equal protection rights because other criminal defendants successfully used a Halcion defense. The district court determined the petition was time-barred. On appeal, however, we determined that the petition was timely. Accordingly, we vacated the district court's judgment and remanded for further proceedings.

*McMillian v. Carochi*, 198 F. App'x 766 (10th Cir. 2006).

On reinstatement of the § 2254 petition, the district court dismissed the action, finding that all but one part of the second claim and all of the third claim were unexhausted and procedurally barred and that the part of the second claim concerning counsel allowing Mr. McMillian to enter a guilty plea while he was under the influence of Halcion and all of the first claim were defaulted in state court as time-barred and as successive. Additionally, the district court determined that Mr. McMillian failed to show cause for his procedural defaults and resulting prejudice or that denial of the review of his claims would result in a fundamental miscarriage of justice. On appeal, we denied a certificate of appealability for substantially the same reasons set forth by the district court.

*McMillian v. Carochi*, 301 F. App'x 801 (10th Cir. 2008).

Mr. McMillian now seeks authorization to raise three claims in a second or successive § 2254 habeas corpus petition: (1) ineffective assistance of counsel at the time of his plea, at sentencing, at the withdrawal of plea hearing, and on direct appeal; (2) denial of due process because his guilty plea was not knowing and voluntary; and (3) denial of equal protection. As before, each of these claims

relates to his taking of the prescription drug Halcion. Because Mr. McMillian seeks to assert the same claims that he brought in the 2005 § 2254 application, they must be dismissed. *See* 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”).

Accordingly, Mr. McMillian’s claims are DISMISSED, and his motion for authorization to file a second or successive § 2254 petition is DENIED. This denial of authorization is not appealable and “shall not be the subject of a petition for rehearing or for a writ of certiorari.” *Id.* § 2244(b)(3)(E).

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish line.

ELISABETH A. SHUMAKER, Clerk